Suruhanjaya Sekuriti Malaysia v Wong Kok Seong & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-523–11 OF 2018
DARRYL GOON J
17 JUNE 2019

Civil Law Act — Summary judgment — Application for — Judicial review application dismissed — No other triable issue — Whether summary judgment ought to be granted

This was an application for summary judgment by the plaintiff against the defendants. The defendants were members of the board of directors of a listed public company. They were given notices to show cause under s 354(1)(a) of the Capital Markets and Services Act 2007 ('the CMSA') read together with reg 4(1) of the Securities Industry (Compliance With Approved Accounting Standards) Regulations 1999 ('the SIR') to which the defendants provided letters of explanation to the plaintiff in response. Subsequently, the defendants were found to have breached s 354(1)(A) of the CMSA read together with reg 4(1) of the SIR and s 369(b)(B) of the CMSA following which, the plaintiff imposed sanctions in the form of penalties pursuant to s 354(3)(b) of the CMSA which were maintained despite the subsequent appeal from the defendants. The defendants never paid the penalties imposed, thus the plaintiff's action was brought to recover the penalties imposed as a civil debt due to the Government of Malaysia. The defendants denied that they were in breach of the CMSA as found by the plaintiff and maintained that the sanctions were wrong in fact and in law to which they had filed an application for judicial review to quash the decisions of the plaintiff, which was subsequently dismissed.

Held, allowing the application for summary judgment with costs of RM5,000:

(1) The judicial review being dismissed, there remained no other triable issue raised as a defence therefore an order in terms for summary judgement ought to be granted. The defendants may not seek to relitigate the findings and sanctions imposed that were raised and decided in the judicial review (see paras 17–19).

[Bahasa Malaysia summary

Ini merupakan permohonan penghakiman terus plaintif terhadap defendan-defendan. Defendan-defendan merupakan ahli lembaga pengarah syarikat awam tersenarai. Mereka telah diberikan notis untuk memberi tunjuk sebab di bawah s 354(1)(a) Akta Pasaran Modal dan Perkhidmatan 2007

('APMP') dibaca bersama perkara 4(1) Securities Industry (Compliance with Approved Accounting Standards) Regulations 1999 ('SIR') yang mana defendan-defendan telah memberikan surat penjelasan kepada plaintiff. Kemudiannya, defendan-defendan didapati telah melanggar s 354(1)(a) APMP dibaca bersama perkara 4(1) SIR dan s 369(b)(B) APMP yang mana, plaintif telah kemudiannya menjatuhkan hukuman selaras dengan s 354(3)(b) APMP yang dikekalkan walaupun wujud rayuan daripada defendan-defendan. Defendan-defendan tidak pernah membayar penalti yang dikenakan, oleh itu tindakan plaintif ini telah dibawa untuk mendapatkan semula penalti yang dikenakan sebagai satu hutang sivil kepada Kerajaan Malaysia. Defendan-defendan menafikan mereka telah melanggar CMSA sepertimana yang dikatakan oleh plaintif dan menegaskan bahawa hukuman yang dikenakan adalah salah disisi fakta dan undang-undang yang mana mereka telah memfailkan permohonan untuk semakan kehakiman untuk membatalkan keputusan plaintif, yang telah kemudiannya diketepikan.

Diputuskan, membenarkan permohonan penghakiman terus dengan kos RM5,000:

(1) Setelah semakan kehakiman diketepikan, tidak wujud isu untuk dibicarakan yang dibangkitkan sebagai pembelaan oleh itu satu perintah sepertimana dipohon untuk penghakiman terus harus diberikan. Defendan-defendan tidak boleh cuba untuk membicarakan semula dapatan dan hukuman yang dikenakan yang telah dibangkitkan dan diputuskan dalam semakan kehakiman (lihat perenggan 17–19).]

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400; [1992] 1 CLJ 627; [1992] 1 CLJ Rep 14, SC (refd)

Government of India v Petrocon India Ltd [2016] 3 MLJ 435; [2016] 6 CLJ 321, FC (refd)

Legislation referred to

Capital Markets and Services Act 2007 ss 354(1)(a), (3)(b), 354(8), 369(b)(B)

Securities Industry (Compliance With Approved Accounting Standards) Regulations 1999 reg 4(1)

Benjamin John Dawson (Eileen Othman and Mohd Aerie Rahman with him) (Benjamin Dawson) for the plaintiff.

Rachel Lim (Lim, Chong, Phang & Amy) for the defendants.

Darryl Goon J:

[1] This was an application for summary judgment by the plaintiff against the defendant brought by way of a notice of application dated 31 December 2018 (encl 7).

THE PLAINTIFF'S CASE

[2] The defendants were members of the board of directors of a listed public limited company known as Trive Property Group Bhd (formerly known as ETI Tech Corp Bhd) in the period between 15 August 2014 and 2 January 2015.

[3] Notices to show cause under s 354(1)(a) of the Capital Markets and Services Act 2007 ('the CMSA') read together with reg 4(1) of the Securities Industry (Compliance With Approved Accounting Standards) Regulations 1999 ('the SIR') and s 369(b)(B) of the CMSA were issued to the defendants by the plaintiff. The notice to show cause issued to the first, third, fourth and fifth defendants was dated 8 August 2017 while the notice to the second defendant was dated 9 August 2017.

[4] Letters of explanation were provided by the defendants to the plaintiff in response to the notices to show caused issued.

[5] Subsequently, the defendants were found to have breached s 354(1)(a) of the CMSA read with reg 4(1) of the SIR and s 369(b)(B) of the CMSA in that, inter alia:

> 14.1 As the directors of TRIVE at the material time, they had at a Board of Directors Meeting on 27.11.2014, unanimously resolved to approve the issuance of TRIVE's Audited Financial Statements for the financial period ended 31.7.2014 ('AFS 2014').
>
> As such, the Defendants had breached Regulation 4(1) of the SIR for failing to ensure that TRIVE performed an impairment assessment on the Development Expenditure ('DE') amounting to RM21.1 million as at 31.7.2014 according to the requirements of the Malaysian Financial Reporting Standard 136: Impairment of Assets ('MFRS 136') ('Breach 1'); and
>
> 14.2 As the directors of TRIVE at the material time, they had at a Board of Directors Meeting on 27.11.2014, unanimously resolved to approve the issuance of the AFS 2014 despite being informed by TRIVE's auditor that they would be issuing a qualified opinion on the DE in the AFS 2014.
>
> As such, the Defendants had knowingly authorized the furnishing of the AFS 2014 that is false or misleading ('Breach 2').

This was set out under para 14 of the affidavit of Leong Wai Leng, the General Manager of the Corporate Surveillance Department of the plaintiff, affirmed on 28 December 2018 (encl 8).

[6] Following this finding, sanctions were imposed by the plaintiff in the form of penalties pursuant to s 354(3)(b) of the CMSA. The sanctions imposed were set out under para 15 of encl 8 and they were as follows:

(i) Sanctions imposed against the first defendant:

Breach	*Sanctions*
Breach 1	Reprimand
	Penalty of RM215,600.00
Breach 2	Reprimand
	Penalty of RM323,400.00

(ii) Sanctions imposed against the second defendant:

Breach	*Sanctions*
Breach 1	Reprimand
	Penalty of RM215,600.00
Breach 2	Reprimand
	Penalty of RM323,400.00

(iii) Sanctions imposed against the third defendant:

Breach	*Sanctions*
Breach 1	Reprimand
	Penalty of RM215,600.00
Breach 2	Reprimand
	Penalty of RM323,400.00

(iv) Sanctions imposed against the fourth defendant:

Breach	*Sanctions*
Breach 1	Reprimand
	Penalty of RM171,500.00
Breach 2	Reprimand
	Penalty of RM294,000.00

(v) Sanctions imposed against the fifth defendant:

Breach	*Sanctions*
Breach 1	Reprimand
	Penalty of RM171,500.00
Breach 2	Reprimand
	Penalty of RM294,000.00

[7] By a letter dated 14 December 2017 sent by the defendants' solicitors, the defendants appealed seeking a review of the decision made against them. However, the findings and sanctions imposed against the defendants were maintained.

[8] Despite the plaintiff's demands, the penalties imposed on each of the defendants were never paid.

[9] Section 354(8) of the CMSA states as follows:

> 354(1) ...
>
> ...
>
> (8) Where a person has failed to pay a penalty imposed by the Commission under paragraph (3)*(b)*, the penalty imposed by the Commission may be sued for and recovered as a civil debt due to the Government of Malaysia.

[10] The plaintiff's action was thus brought to recover the penalties imposed as a civil debt due to the Government of Malaysia.

[11] The reliefs sought by the plaintiff in encl 7, as per the prayers in the plaintiff's statement of claim, were:

(a) as against the first defendant:

  (i) payment for the sum of RM539,000;

  (ii) interest at the rate of 5%pa on the judgment sum from the date of judgment to full realisation thereof; and

  (iii) costs on a solicitor-client basis or costs;

(b) as against the second defendant:

  (i) payment for the sum of RM539,000;

  (ii) interest at the rate of 5%pa on the judgment sum from the date of judgment to full realisation thereof; and

  (iii) costs on a solicitor-client basis or costs;

(c) as against the third defendant:

  (d) payment for the sum of RM539,000;

  (e) interest at the rate of 5%pa on the judgment sum from the date of judgment to full realisation thereof; and

  (f) costs on a solicitor-client basis or costs;

(a) as against the fourth defendant:

(i) payment for the sum of RM465,000;

(ii) interest at the rate of 5%pa on the judgment sum from the date of judgment to full realisation thereof; and

(iii) costs on a solicitor-client basis or costs;

(b) as against the fifth defendant:

(i) payment for the sum of RM465,000;

(ii) interest at the rate of 5%pa on the judgment sum from the date of judgment to full realisation thereof; and

(iii) costs on a solicitor-client basis or costs.

THE DEFENDANTS' DEFENCE

[12] The defendants admit that the penalties were imposed but they denied that they were in breach of the CMSA as found by the plaintiff and maintained that the sanctions imposed were wrong in fact and law.

[13] The defendants further maintained that they had filed an application for judicial review in Permohonan Bagi Semakan Kehakiman No WA-25–167–07 Tahun 2018 ('JR 167') in the High Court in Kuala Lumpur to, inter alia, quash the decisions of the plaintiff.

HEARING OF ENCL 7

[14] JR 167 filed by the defendants ran in parallel with the action herein. As such, encl 7 was adjourned pending the outcome of the JR 167. If successful, and the decisions of the plaintiff quashed, the plaintiff's claim in this action would obviously be no longer sustainable.

[15] On the 30 April 2019, the Kuala Lumpur High Court dismissed the defendants' application in JR 167. This was the defendants' substantive application for judicial review and not merely the application for leave.

[16] On the 15 May 2019 when encl 7 was heard, the defendants offered no other triable issues in respect of the plaintiff's claim. The defendants acknowledged that their application for judicial review in JR 167 was dismissed.

FINDING OF THE COURT

[17] JR 167 having been dismissed, the findings and the sanctions imposed by the plaintiff remains with no other triable issue raised as a defence to the plaintiff's claims.

[18] In addition, the defendants may not seek to re-litigate the validity of the plaintiff's findings and the sanctions imposed that were raised and decided in JR 167. In the *Government of India v Petrocon India Ltd* [2016] 3 MLJ 435 at p 456; [2016] 6 CLJ 321 at p 345, Arifin Zakaria CJ, delivering the judgment of the Federal Court stated:

> [52] Question No 3 also raises the issue of whether estoppel would apply against the respondent in the circumstances of this case. *Estoppel may be invoked in order to prevent a party from relitigating against a counter party, an issue, be it of fact or law after the same had been previously contested or decided in an earlier litigation between the same parties.* (See generally P Ramanatha Aiyar, 'The Law Lexicon' (2nd Ed Reprint, 2010, LexisNexis at pp 656–657).
>
> [53] It is settled law that for issue estoppel to operate against a party the decision on an issue must have been a 'necessary step' to the decision or 'a matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision' (See *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2), Rayner and Keeler Ltd v Courts* [1967] 1 AC 853 at p 965). *To put it simply, the issue in question must have been litigated between the parties and the issue was material to the decision of the court.*

[19] In the circumstances, and there being no triable issues raised against the plaintiff's claim (see *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ 627; [1992] 1 CLJ Rep 14), an order in terms of the plaintiff's application in encl 7 was granted with costs of RM5,000 to the plaintiff.

Application for summary judgment allowed with costs of RM5,000.

Reported by Izzat Fauzan